

Letter of Findings Number: 08-0079
Sales and Use Tax
For the Tax Years 2004, 2005, and 2006

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ISSUES

I. Sales and Use Tax—Imposition.

Authority: IC § 6-2.5-1-1; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-9-3; IC § 6-3-2-2(e)(1); IC § 6-8.1-5-1; IC § 6-8.1-10-2.1; [45 IAC 2.2-3-3](#); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (U.S. 1977); Quill Corp. v. N.D., 504 U.S. 298, (U.S. 1992).

Taxpayer protests the assessment of sales tax on tangible personal property purchased by Indiana residents.

II. Tax Administration – Imposition of Negligence Penalty.

Authority: [IC 6-8.1-10-1](#); IC § 6-8.1-10-2.1; [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer protests the imposition of penalty.

III. Tax Administration – Imposition.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

STATEMENT OF FACTS

Taxpayer, a non-resident limited liability company, is in the business of selling and installing boat docks and lifts. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had failed to remit sales tax on the sales of boat docks and lifts to Indiana residents. Accordingly, the Department determined that Taxpayer owed the uncollected sales tax, interest, and penalty for the 2004, 2005, and 2006 tax years. Taxpayer protested this imposition of the tax, interest, and penalty. A hearing was held on June 5, 2008, and this Letter of Findings ("Letter") results.

I. Sales and Use Tax—Imposition.

DISCUSSION

Taxpayer protests the imposition of sales tax on the boat docks and lifts sold to Indiana residents. In support of its position, Taxpayer argues that title and possession of the boat docks and lifts did not transfer in Indiana (if at all) and that Taxpayer, based on its business practices, has not established a sufficient jurisdictional nexus on which the Department may impose a tax liability. Additionally, Taxpayer argues that any tax liability resulting from the sales of the boat docks and lifts should be borne by the Indiana residents who purchased the items.

Pursuant to IC § 6-2.5-2-1, when a retail transaction is made in Indiana, the retail merchant is required to collect a state gross retail (sales) tax as an agent for the state. IC § 6-3-2-2(e)(1). When the retail merchant has a duty to collect state gross retail (sales) or use taxes and fails to do so, then the retail merchant is "liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state." IC § 6-2.5-9-3. Moreover, pursuant to IC § 6-8.1-5-1(c), all tax assessments are presumed to be accurate, and the taxpayer bears the burden of proving that an assessment is incorrect.

Taxpayer argues that it should not have to pay sales tax on the numerous transactions at issue since "[t]itle and possession did not transfer in Indiana," and that Indiana lacks a jurisdictional nexus to impose a tax liability on Taxpayer. Taxpayer further argues that the sale of the tangible personal property in question takes place "through the mail or over the phone," that it does not have any sales representatives based in Indiana, and that it does not store or display its products in Indiana.

Indiana adheres to a "destination" rule regarding the sale of tangible personal property. Under Indiana law, the sales of the boat docks and lifts take place in Indiana because the boat docks and lifts are delivered by the taxpayer to residents in Indiana. IC § 6-2.5-4-1(e). Additionally, IC § 26-1-2-401(2)(b) states that "[u]nless otherwise agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods...."

However, the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, prohibits a state from exercising taxing authority over entities that do not have a "substantial nexus" with the state. Put another way, the Commerce Clause requires that there exist a "substantial nexus" between a state and the object of the tax before the state can exercise taxing authority over the object of the tax. Whether the Department can establish the required "substantial nexus" to impose tax liability on Taxpayer is evaluated under a four-part test first enunciated by the Supreme Court of the United States in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (U.S. 1977), and further explained in Quill Corp. v. N.D., 504 U.S. 298, (U.S. 1992). Under the test, which is viewed under a Commerce Clause analysis, a tax imposed against a non-resident taxpayer is constitutionally sound as long as it [1] is imposed on a taxpayer "with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not

discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." Quill at 311. Taxpayer argues that the assessed tax violates the Commerce Clause because taxpayer does not have a "substantial nexus" with Indiana.

Under Quill, "a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." Id. However, the facts detailed in this Letter involve more than the mere solicitation of business or delivery by a third-party carrier. Taxpayer's invoices showing that, at times, terms of payment, such as "cash on delivery," were fulfilled at delivery sites in Indiana. Indeed, Taxpayer sells and delivers boat docks and lifts to Indiana residents, using its own vehicles to transport the items. Once delivered to residents in Indiana, Taxpayer's employees install the items. During the audit years covered, Taxpayer sold, delivered, and installed approximately fifty (50) items in Indiana. Taken in its totality, Taxpayer's action represent a substantial nexus with Indiana.

Taxpayer also argues that any tax liability resulting from the sales of the boat docks and lifts should be borne by the Indiana residents who purchased the items. Pursuant to IC § 6-2.5-3-2, when an Indiana resident fails to pay sales tax on the purchase of an otherwise taxable item, the Department may assess and impose on the resident a use tax. However, more importantly, under IC § 6-3-2-2, a retail merchant doing business in Indiana is required to collect and remit sales tax. The Department is authorized under IC § 6-2.5-9-3 to assess tax liability against the retail merchant. In the interest of administrative efficiency, the Department correctly did so.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration –Imposition of Negligence Penalty.

DISCUSSION

The taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case. In this case, taxpayer submitted adequate arguments and documentation to sustain its protest to the imposition of the penalty.

FINDING

Taxpayer's protest is sustained.

III. Tax Administration –Imposition of Interest.

DISCUSSION

The taxpayer protests the imposition of interest on its non-collection and non-payment of sales tax of boat docks and lifts sold to Indiana residents. Statutory liability for interest in such situations is contained in IC § 6-8.1-10-1, which states:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

The Department does not have the authority to waive interest.

FINDING

Taxpayer's protest is respectfully denied.

